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ART. I. — *The Diplomatic and Official Papers of Daniel Webster, while Secretary of State.* New York: Harper & Brothers. 1848. 8vo. pp. 392.

IT was a fortunate thing for the world, as well as for the two countries immediately interested, when, in 1842, the British government determined to send a special envoy to the United States, to negotiate upon matters then in controversy, that Mr. Webster was our Secretary of State. The fact that he was then in office undoubtedly was the chief inducement with the English ministry for taking the extraordinary step of sending to us a special minister; and they were equally wise and fortunate in selecting as their agent a nobleman fully competent to discharge the trust reposed in him by his own government, and possessing the high qualifications of friendly feelings towards this country, and of respect entertained for him here. The great transactions in which these eminent persons were concerned, as the representatives of two powerful nations, have now become matters of history; and the first thing that strikes us, six years after they took place, is the absence, on this side of the water, of that degree of appreciation which is due to the American negotiator's great productions on several of the topics involved in the correspondence. We do not mean to say that Mr. Webster has not been praised for the Treaty of Washington, or that the country has not, with something like unanimity, duly appreciated the fact, that, after every body else had failed to settle the long-pending difficulties, he made a treaty

with England, which saved us from a war with perfect honor and with full equivalents for every thing conceded. Still, we do not think that there has been in this country that full acknowledgment of his services as Secretary of State, and that high estimate of his diplomatic labors, which we know are felt and entertained in Europe.

Lord Aberdeen, in the debate in the House of Lords, on the proposal of a vote of thanks to Lord Ashburton for his services in these negotiations, said, — "It happens but too often that we not only show little gratitude to those who have extricated us from difficulties and dangers, but we forget the very existence of the apprehensions from which we have been freed." Both parts of this remark have been realized here in the case of Mr. Webster; and one reason for this, apart from the general tendency of mankind to forget such services, has been a political one. During all the time that Mr. Webster was engaged in these negotiations, he remained in office against the wishes of a vast majority of his own political party, who had — whether rightfully or wrongfully it is no business of ours to inquire — a standing and bitter quarrel with Mr. Tyler, then President of the United States. Whether his party were right in wishing the Secretary to surrender the care of our foreign affairs before he had completed the great work of peace, or whether he was right in retaining it, we do not now propose to consider. We are afraid that it must be allowed there has always been a reluctance on the part of the Whigs to acknowledge that any good has come out of the Nazareth of Mr. Tyler's administration; and for this reason, mainly, that the attention of the country has not, by that party, been directly called to the crowning glory of that administration, the results accomplished by Mr. Webster as Secretary of State. Of course, the attention of the people would not be called to his services by his political opponents.

We, however, who have a right to stand aside from the political influences that may have operated in several ways upon this matter, propose to attempt this, — chiefly in order to exhibit the great merit of Mr. Webster's productions in a judicial point of view. The Treaty of Washington, so far as it embraced a question of boundary, is a past transaction, and may be regarded as an old action of ejectment, tried and adjudicated. Although conducted with great skill, tact, and

discretion, with the vast resources of a profound knowledge of an entangled controversy of fifty years' standing, the whole affair of the boundaries presents no question of permanent interest, that is to operate hereafter as a great principle; although the example given by the negotiators, of settling such a controversy by a line of compromise and equivalents, is of great and permanent importance to the world. But there were other subjects involved in that negotiation, upon which principles were discussed and settled that will have an influence in the world as long as civilization exists on the face of the globe; and it is to these that we desire now to turn our attention. We confess ourselves anxious that men of liberal cultivation in this country should observe how the science of public law may be brought to bear upon the practical affairs of nations. We wish that the public mind should appreciate what our own government has done for the advancement of those great principles which uphold the peace and intercourse of the world. Wars and victories are readily enough appreciated, both at home and abroad. Our name for valor and skill in the field of arms has lately gone abroad through the earth. We are by no means disposed to undervalue the advantages of that reputation; but there are other honors to which we are entitled, and other laurels that may of right be claimed for the American name. We desire, therefore, not merely for the sake of Mr. Webster's honor, but for the honor of the country, to point out, if we can, how admirably the true principles of international law have been applied and explained by him, for the settlement of questions, some of which had long vexed the world, while others were of novel impression. Jurists, who may hereafter have occasion to teach or enforce these principles, will find few illustrations in history more suited to their purpose than may be found in these papers; and statesmen, who may hereafter have to deal with analogous questions, will find in these discussions their principal resources, and often the conclusive precedents.

We place at the head of these papers the discussions on the subject of impressment. From the commencement of the French Revolution until the war between England and the United States which commenced in 1812, the British government had been in the habit of entering American merchant-vessels, and impressing therefrom, into the service

of their own navy, seamen who were suspected by the boarding officer to be British subjects. The impressment of a seaman from a vessel on the high seas means nothing more or less than the taking of such a seaman by an overwhelming force, and against his own consent and that of his commander, from the vessel in which he is found, and forcing him to enter the service of the impressing party. From the difficulty of distinguishing the national character of persons descended from a common stock, and from the fact that the practice of impressment must be exercised, if permitted, at the mere discretion of the boarding officer, it always has happened, as it always must happen, as between England and the United States, that the citizens of the latter country are just as much exposed to its consequences as the subjects of the former. It is matter of record, that between the month of July, 1796, and the month of April, 1797, the American minister in London had to make application for the discharge from British men-of-war of two hundred and seventy-one seamen, claiming to be Americans, who had been impressed from American merchant-vessels on the high seas. There must have been many more who were never in a situation to claim the interference of their own country; but of the number who did thus claim it, eighty-six were discharged on evidence of their American character, thirty-seven were detained as British subjects or American volunteers, and to the application for the discharge of the remaining one hundred and forty-eight the American minister received no answer, the ships on board of which they were detained having sailed before an examination was made. Mr. King was, however, in possession of satisfactory evidence to prove the American character of most of them.

The enormous extent of these wrongful seizures had, it is well known, produced a deeply exasperated state of feeling in the people of this country, which was one of the chief causes of the subsequent war. Great as were the personal wrongs and sufferings, however, they were not the sole consequences of this practice. The entry of a searching officer from a belligerent into a neutral vessel, upon the high seas, is an act of force and a trespass, which is permitted for a few purposes that are allowed to form a sufficient justification by the laws of nations; but when such a justification is wanting, the sovereignty of the nation to which the vessel belongs is

violated in the same manner, and to the same extent, as when a similar trespass is committed upon the land. That sovereignty is, for the time being, displaced by another and superior force, and the nation thus loses, for the time being, the power to protect its own subjects, who are entirely at the mercy of the invading power. These consequences were felt most keenly by the American people and by American statesmen, before the war of 1812. But they had not been able to overthrow the practice, because no one had met the doctrine on which the British right was claimed to be founded by a demonstration that no such right can exist, consistently with the rules and principles of the law of nations. The limitation, suspension, or abolition of the alleged right had been made matter of request and negotiation and proposed convention, but without success; and no one had ever met and refuted the alleged right itself, down to the time when Mr. Webster took up the subject. The question stood in 1842 just where it had always stood. England had never renounced the practice, or the claim of right on which she founded it; and it was liable to be again resorted to at any time, with the certain results of far greater abuses, in consequence of our greatly increased commercial marine, and of inevitable and bloody war following the very first instance of its repetition. Mr. Webster seems to have felt deeply the importance of putting this subject at rest for ever. He could not consent that the sovereignty and the commerce of this country, and its maritime people, should ever be again exposed to this flagrant wrong. He could not, as a statesman, view with indifference the violation of all principle involved in this practice, and he saw very clearly the benefit to the peace of the world that would result from a thorough vindication of the rules of public law which it necessarily infringes. He resolved, therefore, to present it in such a light that the British government must either answer his positions, or leave the world to draw the just inference that they are unanswerable. He accordingly took the opportunity of Lord Ashburton's mission, and of the friendly feeling then existing between the two governments, to place before the English ministry the doctrine which is hereafter to constitute the ground of American action on this important subject.

He found that the British claim of right to impress seamen from neutral merchant-ships was based, by their jurists and

statesmen, upon the prerogative of the crown of England, which is founded on the English law of the perpetual and indissoluble allegiance of the subject, and his obligation under all circumstances, and for his whole life, to render military service to the crown, whenever required. The general doctrine of the law of England on the subject of military service is indisputable, and no one need dispute it. The question is, whether this law, or any other mere municipal law, is or is not illimitable in respect to the place of its operation. The practice of impressment from neutral ships on the high seas involves this assumption, — that the municipal law of England not only operates in English territory, but possesses an inherent power, *proprio vigore*, to enter the territory of another nation, and there to determine the rights of persons by its own rules. If it has such a power, it is paramount to the law of nations, which it instantly displaces ; because the two systems of law are not concurrent in their determination of the rights of persons on the point in question. The law of England asserts that a British subject is bound to perpetual allegiance and service ; the law of nations recognizes no such obligation. On the contrary, its doctrine is, in the case of seamen, that they may lawfully enter the merchant service of any nation with which their own is at peace ; and having entered such service, they acquire rights and assume relations which the law of nations recognizes as valid, — such as the right to complete their contract, and to receive their stipulated pay, and the right of the neutral master to have their contract performed. These relations are forcibly displaced, as soon as an impressing officer sets his foot on board the neutral vessel to assert the prerogative of the crown of England, and by it to take the mariner away.

What is the place where the municipal law of England undertakes to operate, in the case of impressment from a neutral vessel? The force of every system of municipal law concerning the relations of persons depends upon territorial sovereignty, for two reasons: first, because, beyond the territory of the sovereign whose law is in question, the rights of persons are determined by an entirely different set of rules ; and secondly, because no nation can go beyond its own territory to enforce its own law by its own power, for its executive power is necessarily confined to its own territorial jurisdiction. The few cases in which the law of nations permits an entry

into the ships or other territory of another nation, for certain special and limited purposes, are not cases of the exercise of the executive power of one nation in the territory of another, to enforce the rule of its own law, but they are the exercise of a limited right, conceded by nations to each other, which right is defined by the law of nations, and does not spring from the municipal law of any country. A neutral merchant-ship, upon the high seas, is an extension of the territorial sovereignty of its own country. Wherever it is found, it bears with it, for the determination of the relations of those on board, the law of the country to which it belongs ; and for its right to be where it is, and to carry with it the law of its own country for the government of those on board, it depends upon the law of nations. No other power, sovereignty, rule, or principle can enter it, to disturb the relations of persons or things on board, except in the few conventional cases permitted by the law of nations for the exercise of belligerent rights, of which impressment is not one.

It follows, therefore, that the practice of impressment not only intrudes into a neutral merchant-vessel the rule of a foreign law for the determination of the rights of persons, but it undertakes to exercise executive power in the territory of another nation for the enforcement of that rule. The consequence is, that the sovereignty of the nation to which the vessel belongs is entirely superseded ; and when the sovereignty of his own country is no longer over him, the individual is at the mercy of whatever power has intruded into its place.

It was upon this doctrine that Mr. Webster took his stand. He enforced it with many illustrations and arguments, which we should only weaken by attempting to repeat them, and for the quotation of which we have not room. But we should do injustice to his great and striking argument, if we omitted to remind the reader of his vivid picture of the injustice of England, in maintaining her doctrine of perpetual allegiance over those hordes that she has been glad to pour forth from her crowded hive into this Western world, and who have here found that subsistence which the British isles cannot supply. After having gone through with these and many other forcible statements of the injustice of the practice of impressment, he announced, in measured but explicit language, the solemn determination of the American government, in these memorable words : —

"Under these circumstances, the government of the United States has used the occasion of your Lordship's pacific mission to review this whole subject, and to bring it to your notice and that of your government. It has reflected on the past, pondered the condition of the present, and endeavoured to anticipate, so far as might be in its power, the probable future; and I am now to communicate to your Lordship the result of these deliberations.

"The American government, then, is prepared to say that the practice of impressing seamen from American vessels cannot hereafter be allowed to take place. That practice is founded on principles which it does not recognize, and is invariably attended by consequences so unjust, so injurious, and of such formidable magnitude, as cannot be submitted to.

"In the early disputes between the two governments on this so long contested topic, the distinguished person to whose hands were first intrusted the seals of this department declared, that 'the simplest rule will be, that the vessel being American shall be evidence that the seamen on board are such.'

"Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration, now had, of the whole subject, at a moment when the passions are laid, and no present interest or emergency exists to bias the judgment, have fully convinced this government that this is not only the simplest and best, but the only, rule which can be adopted and observed, consistently with the rights and honor of the United States and the security of their citizens. That rule announces, therefore, what will hereafter be the principle maintained by their government. In every regularly documented American merchant-vessel, the crew who navigate it will find their protection in the flag which is over them.

"This announcement is not made, my Lord, to revive useless recollections of the past, nor to stir the embers from fires which have been, in a great degree, smothered by many years of peace. Far otherwise. Its purpose is to extinguish those fires effectually, before new incidents arise to fan them into flame. The communication is in the spirit of peace, and for the sake of peace, and springs from a deep and conscientious conviction that high interests of both nations require this so long contested and controverted subject now to be finally put to rest. I persuade myself, my Lord, that you will do justice to this frank and sincere avowal of motives, and that you will communicate your sentiments in this respect to your government." — pp. 101, 102.

This declaration will stand. It has never been answered, probably for the sufficient reason, that no one has ever found himself able to answer it. The reply of Lord Ashburton did

not profess to be an answer to the argument which had been addressed to him. He made a few suggestions, to the effect that the difficulty of the case arises from the circumstance that the laws of England and America maintain opposite principles respecting allegiance to the sovereign; but he attempted no answer to the argument which had shown that the sphere of English law is English territory. In the discussion which followed in both Houses of Parliament after Lord Ashburton's return, the subject of impressment was not even alluded to; and from that day to the present, no counter argument, statement, or declaration on this subject has ever been made by the British government, or by any British statesman. We have a right, therefore, to conclude that the subject is at rest, and that the practice will never be resumed. The question is settled, for us and for the whole world.

Here, then, is matter for congratulation and glory. It is not valuable as a mere triumph of American intellect, or for the gratification of national pride. Nor is it valuable solely for the personal security which it has thrown over the citizens of this country, wherever they may, in all coming time, pursue their lawful avocations on the ocean. It is not merely because the American citizen, native or adopted, will no longer be compelled to quit his own employments and be forced to fight the battles of England, that we mark what has been done. It is because, among the causes of war between two kindred nations whose renewed conflicts will light up the flames of battle throughout the globe, one of the most irritating and imminent has been stricken from the catalogue; because the power and vigor of the public law have been manifested by a striking practical application to human rights; and because justice, and right, and national safety, and national honor have all been vindicated by an exertion of intellect appealing to intellect, instead of an appeal to arms.

We take next the correspondence growing out of the case of the "Creole," because it involves principles in some respects identical with those asserted in the correspondence on the subject of impressment. The Creole was an American vessel, having slaves on board, which was carried into the port of Nassau, in the winter of 1841–42, by persons who had risen upon the lawful authority of the vessel, and, in the accomplishment of their purpose, had committed murder on a person on board. The slaves were set free; but whether

by the positive and officious interference of the local authorities, or not, was not certain at the time when it was made the subject of correspondence. Other cases had occurred, of American vessels, having slaves on board belonging to citizens of some of our Southern States, driven by stress of weather into British ports, in passing between the United States and the Bahama islands ; and the slaves had been set free by the local authorities, acting upon the doctrine of the English law, that the state of slavery cannot exist in English territory. In some of these cases compensation was made, and in others it was refused, to the owners of the slaves thus liberated. These cases presented a most important question, deeply interesting to the American government, and not merely interesting to the slave-holding States of this Union ; because they presented another application of the English doctrine, that the law of England can sometimes act extra-territorially upon the rights and relations of persons not subjects of the English crown. When a vessel is carried from the high seas by stress of weather, or by the violence of persons on board acting against the lawful authority of such vessel, into a foreign friendly port, the law of nations declares, beyond all controversy, that the vessel is not exclusively within the territorial jurisdiction of the country in whose actual territory it happens to be found, but that the territorial jurisdiction of its own country and its own laws, so far as the condition, relations, and duties of those on board are concerned, is still preserved over it. If, therefore, the law of the foreign port can enter such a vessel, and affect in the slightest degree the relations of persons on board, or change the condition affixed to them by the law of their own domicil and that of the vessel, it must do so by virtue of a power to act beyond its own territorial jurisdiction, and to act where that jurisdiction ceases to be exclusive. Whether the law of England can do this was the grave question which presented itself to Mr. Webster's consideration. It was clearly his duty to apply to it the same principles which he undertook to apply to the practice of impressment. The fact, that the English pretension, in this case, seemed to be on the side of mercy for the individuals liberated in such cases, could not alter the rules of public law, or the relations of the American government to the doctrine asserted by the British government. Mr. Webster, accordingly, opened a correspondence

with Lord Ashburton with regard to this doctrine, with the view of bringing about some arrangement or understanding which would prevent American vessels, when passing along the coast of Florida, from one State of the Union to another, where slavery is tolerated by law, and having slaves on board, the property of citizens of the United States, as mariners or passengers, and being carried into one of the British islands by stress of weather, or by the violence of any of the persons on board, from being interfered with by the local authorities of those islands, exerting themselves to free such slaves, or to prevent the proper authority of the vessel from bringing them away. This was his sole purpose; and he addressed himself to the accomplishment of this purpose in a paper which was well characterized by Lord Ashburton as "an elaborate and important argument on the application of the general principles of the law of nations to these subjects," — "an argument," his Lordship added, "to which your authority necessarily gives great weight."

This argument proceeded upon the doctrine, that, by the law of nations, when a vessel enters a foreign friendly port, she carries with her the jurisdiction and laws of her own nation, for the general purpose of governing and regulating the rights, duties, and obligations of those on board, and that, to the extent of the exercise of this jurisdiction, the vessel is considered as a part of the territory of the nation itself. This jurisdiction is not exclusive. If any person on board such a vessel commit a crime against the local law, or enter into a contract with the citizens of the place, he is amenable to the local law. But until an offence has been committed against the local law, or a contract has been made under it, it cannot affect the persons on board such a vessel, because the case has not arisen over which that law has jurisdiction. The rights of the persons on board in the property on board, and their relations and obligations among themselves, are fixed by the law of their own country, and are exclusively the subjects of its jurisdiction. If this jurisdiction were not exclusive as to these subjects, it would follow that the local law could make the property of one man become the property of another, could dissolve shipping-articles, marriages, and other contracts, and entirely change the relations of persons whose relations are derived from the law of their own country.

Mr. Webster did not deny that it is competent to any

nation to declare, by positive enactment, or other proper declaration of her will, that no other nation shall exercise any jurisdiction over even its own vessels in her waters or in her territories. But he declared that, in the absence of such positive declaration, the presumption is that foreign ships bring with them the jurisdiction of their own country, according to the law of nations, over all the subjects as to which the law of nations preserves that jurisdiction. The personal relations and personal condition of those on board is one of these subjects.

Lord Ashburton did not undertake to answer Mr. Webster's argument. He recognized the importance of the question and the ability with which it had been discussed by the American Secretary; but intimated that it had better be referred for discussion to London, "where it would have a much increased chance of settlement, on terms likely to satisfy the interests of the United States." He added, however, the following declaration: — "In the mean time, I can engage that instructions shall be given to the governors of her Majesty's colonies, on the southern borders of the United States, to execute their own laws with careful attention to the wish of their government to maintain good neighbourhood, and that there shall be no officious interference with American vessels driven by accident or by violence into those ports. The laws and duties of hospitality shall be exercised; and these seem neither to require nor to justify any further inquisition into the state of persons or things on board of vessels so situated, than may be indispensable to enforce the observance of the municipal law of the colony, and the proper regulation of its harbours and waters."

When the treaty and the accompanying correspondence were afterwards attacked by the Whigs in Parliament, Lord Ashburton was severely blamed by them for having engaged that these instructions should be given. Lord Campbell is reported to have held the following language: * —

"In the year 1836, the ship Enterprise was driven by stress of weather into Bermuda, and then the legal authorities had no option. It was precisely as if a vessel with a cargo of slaves came into Portsmouth, that they sued out a writ of *habeas cor-*

* We quote from a report of the debate in the *London Morning Chronicle* of April 8, 1843.

pus, and were brought before his noble and learned friend the Chief Justice of the Court of Queen's Bench, and who would be bound to liberate them [hear, from Lord Denman]. The Chief Justice of Bermuda was obliged to do the same thing, and accordingly he liberated the slaves. Compensation was claimed for those slaves by the American government, and he [Lord Campbell] as Attorney-General, came to the conclusion that no compensation could be made. The slaves that had been were no longer slaves; the moment they entered an English port, they were entitled to their freedom: it would be a trespass to detain them; they would be in the same situation as emigrants unlawfully imprisoned; and in the case of the Enterprise, compensation was refused. For several years the American government acquiesced in that decision, and the general understanding between the two governments was, that no compensation could be made in such cases. Mr. Webster tried to get Lord Ashburton to admit that compensation was due, or that a new law should be passed applicable to English ports, to recognize the slave-trade, and to enable the masters to take away their slaves. Mr. Webster entered into the general principle; he tried to show that the slaves ought not to be liberated, that the masters were wronged if they were so liberated, and that the American government had, in these cases, a right to demand compensation. The reasoning of Mr. Webster would have shown that the negro Somerset ought to have been kept captive by Lord Mansfield. But not only was the law of England as he [Lord Campbell] had laid it down, but it was the law of America also; for Professor Story, greater than any law-writer of which this country could boast, or which we could bring forward since the days of Blackstone, said that slavery was a local law, but that the moment the slave got beyond the limits of that local law, he had broken his chains, he had escaped from his prison, and he was free, and entitled to the protection of the American law. And Mr. Story followed up this doctrine with sentiments which would have done credit to his noble and learned friend (Lord Denman) who so worthily presided over the Court of Queen's Bench here, and who had ever proved himself a distinguished friend to the freedom of the human race. When an English port received a slave cargo, from that moment the whole of the individuals composing that cargo were entitled to their freedom. What, then, ought to have been the answer of our negotiator to such a demand? And be it observed, that there was not the slightest difference in this respect between Bermuda and Portsmouth. He ought either to have refused to enter into this negotiation at all, or he ought to have asserted the high principle upon which the English govern-

ment had acted in the case of the Enterprise, and on which he [Lord Campbell] trusted the noble earl opposite would continue to act."

With great respect for the character of Lord Campbell, we are obliged to notice several errors into which his zeal seems to have betrayed him. In the first place, he represents Mr. Webster as having made a demand for compensation in the case of the Creole. This was a mistake. No demand was made for compensation, because the precise facts were still in controversy; but undoubtedly the principle contended for by Mr. Webster would require compensation to be made in any case of the liberation of slaves *from on board a vessel* which had come into a British port under the circumstances supposed by Mr. Webster in the case presented by him as the case for discussion. In the next place, Lord Campbell represented Mr. Webster as trying to get the British government to pass a new law applicable to English ports, "to recognize the slave-trade." What slave-trade? Mr. Webster had referred to no slave-trade. He stated the occasion for some arrangement or understanding on this subject in the following terms: —

"No particular ground of complaint exists as to the treatment which American vessels usually receive in these ports, unless they happen to have slaves on board; but, in cases of that kind, complaints have been made, as already stated, of officious interference of the colonial authorities with the vessel, for the purpose of changing the condition in which these persons are, by the laws of their own country, and of setting them free.

"In the Southern States of this Union, slavery exists by the laws of the States, and under the guaranty of the Constitution of the United States; and it has existed in them from a period long antecedent to the time when they ceased to be British colonies. In this state of things, it will happen that slaves will be often on board coasting-vessels, as hands, as servants attending the families of their owners, or for the purpose of being carried from port to port. For the security of the rights of their citizens, when vessels having persons of this description on board are driven by stress of weather, or carried by unlawful force, into British ports, the United States propose the introduction of no new principle into the law of nations. They require only a faithful and exact observance of the injunctions of that code, as understood and practised in modern times." — p. 84.

In the third place, Lord Campbell begged the whole question which Mr. Webster raised. He assumed that the slave, in the case put by Mr. Webster, and in the cases which had actually happened, had got beyond the limits of the law which made him a slave, and that therefore he was free. He assumed that when a slave, coming from a country which recognizes slavery, is on board a vessel of that country, driven by stress of weather, or brought by unlawful force, into the waters of a British port, his case is the same as if he had landed; that he is beyond the jurisdiction of his own law; and that he is free for the same reason on which Somerset was declared free by Lord Mansfield, namely, by force of the law of England. This, therefore, is the naked claim of a power in the law of England to enter such a vessel and to oust the jurisdiction of its own country over it; for the slave cannot be beyond the law of his own country, being on board, unless the jurisdiction of his own country has been displaced from the vessel by some other jurisdiction, which has thus become exclusive over the subject-matter.

Lord Campbell makes an apparent use of the authority of Mr. Justice Story to sustain his position. We profess to have a pretty intimate acquaintance with the works and the judgments of our distinguished countryman; but we know of nothing that ever proceeded from his pen, that countenances the doctrine, that the relations or condition of persons on board a foreign vessel, situated as was supposed in the case put by Mr. Webster, can be affected by the local law of the country in whose port such vessel happens to be. We presume that Lord Campbell referred to the following passage in Judge Story's work on the Conflict of Laws: —

"There is a uniformity of opinion among foreign jurists, and foreign tribunals, in giving no effect to the state of slavery of a party, whatever it might have been in the country of his birth, or of that in which he had been previously domiciled, unless it is also recognized by the laws of the country of his *actual domicil*, and where he is found, and it is sought to be enforced. . . . . In Scotland, the like doctrine has been solemnly adjudged. The tribunals of France have adopted the same rule, even in relation to slaves coming from their own colonies. This is also the undisputed law of England. It has been solemnly decided, that the law of England abhors and will not endure the existence of slavery *within the nation;* and consequently, as soon as a slave

lands in England, he becomes *ipso facto* a freeman, and discharged from the state of servitude. Independent of the provisions of the Constitution of the United States for the protection of the rights of masters in regard to domestic fugitive slaves, there is no doubt that the same principle pervades the common law of the non-slaveholding States in America; that is to say, foreign slaves would no longer be deemed such after their removal hither." — § 96.

We have Italicized the words in this passage which show conclusively the author's meaning, that the law of the foreign country does not attach to change the condition of a slave until it has become his "actual domicil"; until he is "within the nation"; or, in other words, when he is "landed." There is no doubt that, when he is landed within a nation whose law does not recognize slavery, he is discharged from the state of servitude, because the jurisdiction of that nation has become exclusive by his entering into its dominion. But, as Lord Ashburton truly remarked, "What constitutes the being within British dominion, from which these consequences are to follow?" Surely, we answer, it is not when the slave is still where the law of nations keeps over him the jurisdiction of his own country. Judge Story, in another part of the same work from which we have quoted, lays down the same principle as that on which Mr. Webster relied, in these words: —

"It is plain, that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and *jurisdiction* of that country. They can bind only its own subjects, and others who are within its *jurisdictional limits; and the latter only while they remain therein.*" — § 7.

This position the learned author enforces with his usual copiousness of illustration and authorities. Nothing that we are aware of, proceeding from him, weakens Mr. Webster's argument at all; and we have the best reason for knowing that he considered the doctrine asserted in that argument as entirely sound, and as a just and correct limitation of the power of local law by the operation of the law of nations.

We doubt not that there are many benevolent persons, on both sides of the Atlantic, who, looking only to the fact, that the operation claimed for the law of England in cases of this kind would, if allowed, give freedom to certain slaves,

have regretted that any opposition should have been made to it. We may remind such persons, that the same argument which overthrows Mr. Webster's position in the case of the Creole will beat down his argument on the subject of impressment. What is law in the one case must be law in the other; because the same effect is claimed for the law of England in both cases; namely, a power to operate on the condition and rights of persons on board a foreign ship, when not within the exclusive jurisdiction of England, but being still within the jurisdiction of its own nation. If the rule of the law of England, which declares that slavery cannot exist in English territory, can enter a foreign ship while lying in a British port, and dissolve the obligations existing among the persons on board, it must be because such persons are within the dominion of England, that is to say, within its exclusive jurisdiction. If they are so, then, with equal reason, the rule of the law of England which gives a naval officer a right to impress British subjects into the service of the crown, wherever he can find them, may enter an American vessel on the high seas, and may justify that officer in breaking up the relations of the persons on board; because those persons are just as much within the dominion of England, when sailing upon the high seas, so far as their mutual rights and obligations are concerned, as the persons on board the same ship would be when lying in the waters of a British port, into which it had come by no volition of the lawful authority of the vessel, but by stress of weather, or by the violence of revolt.

The fallacy, then, of likening these cases to the case of Somerset, or to the cases which have occurred in the free States of this Union, of slaves brought voluntarily by their owners within the jurisdiction of a State which does not recognize slavery, is apparent from the consideration, that in the one case the law of nations keeps the law of native domicil still in force, while in the other the law of the actual domicil has become exclusive. When a master has voluntarily taken his slave upon English territory, and still seeks to enforce the condition of slavery created by a foreign law, he appeals to a law which does not recognize and has no means of enforcing that condition. Hence the slave is free; because the foreign law cannot operate in English territory, and the English law has no means of enforcing the condition of slavery which the foreign law creates. The same reasons would apply to the

case of a slave who had escaped into England from a country tolerating slavery, against the master's will; and, but for the provisions in the Constitution of the United States, the same reasons would produce the same result in the free States of this Union. In such cases, where the party is actually within the dominion of the country not recognizing slavery, a conflict arises between the law of that country and the law of his native domicil; and the law of nations decides, that the law of the country in which he is found can alone operate in the territory of that country. But this is a totally different case from that of a party who is still, according to the law of nations, within the actual jurisdiction and territory of his own country.

The question in relation to what was at first called the right of search, and afterwards the right of visit, was also happily disposed of in the Treaty of Washington, by an arrangement which rendered unnecessary the continued assertion of the right on the one side and its denial on the other. But in order to appreciate the merits of the treaty and the correspondence connected with it in reference to this matter, it is necessary to review the position of the question. The British government, finding that the American flag was often fraudulently made use of by slave-traders on the coast of Africa, had been for some time previous to the year 1842 in the habit of instructing their cruisers to ascertain the nationality of merchant-vessels trading on the coast of Africa, by detention and inspection of their papers and cargoes. Great abuses had consequently taken place. American merchant-men, engaged in lawful traffic, had been detained, searched, their voyages broken up, and in some cases their cargoes unshipped, on the suspicion of British officers that they were engaged in the slave-trade. When Mr. Everett arrived in London, in the latter part of the year 1841, to enter upon his duties as minister plenipotentiary, there were at least four of these cases, in which a claim for redress had been submitted by his predecessor to the British government, but on which no answer had been received. Mr. Everett prosecuted these claims with all proper despatch, and the result was, that compensation was very handsomely made in several of them. But compensation is a very imperfect remedy against the exercise of a practice which cannot be defended on grounds of law, and which is so annoying and

injurious to commerce, and so irritating in itself, as the practice of arresting, detaining, and searching merchant-vessels in time of peace.

This practice was at first justified on the ground of what was called the right of search. It was soon recollected, however, that the right of search, being the right to enter a merchant-ship and search for evidence of the national character of vessel and cargo, was a purely belligerent right, and therefore could not be exercised in time of peace, unless created by treaty. The name of the thing was then changed, and it was called the right of visit; the object of the visit being to ascertain, by personal inspection, whether the vessel visited lawfully bore the flag under which she was sailing. The British government admitted that their cruisers could not exercise the belligerent right of search, in time of peace; but they claimed the right, at any time, to go on board any merchant-vessel, for the purpose of ascertaining whether it was lawfully using the flag which it might be found using; and this right they called the right of visit, in contradistinction to the right of search. As soon as this distinction was propounded, all Europe teemed with discussions on the question, whether any such distinction exists; while the manner in which the British cruisers were at the same time exercising the alleged right showed pretty conclusively that there is no practical distinction, in the means of exercising the right in order to arrive at the object, between the belligerent search and the visit in time of peace. In the cases of the American vessels Tigris, Seamew, and several others, the British officers searched, detained, and captured precisely as if they were overhauling a merchant-vessel, in time of war, engaged, or supposed to be engaged, in violating belligerent rights.

The great difficulty in regard to this practice, in peace, whether it is called the right of search or the right of visit, is, that the law of nations does not permit it. It may be shown, upon the highest authority, that the practice is the same thing, whether it is called by the one name or the other. We presume that, on a question of this kind, the highest authorities will be conceded to be the public tribunals of enlightened states specially charged with the administration of public law. No tribunals in the world have stood higher than the High Court of Admiralty in England, when presided over by Sir William Scott, and the Supreme Court of the United

States, when Marshall presided in it and Story sat at his side. Both of these tribunals concurred in describing the right of entry into a merchant-vessel on the high seas, not as the right of search, or the right of visit, but as the right of "visitation and search"; thereby clearly implying, that, although the visit must precede the search, yet that when the one right exists it necessarily draws after it the other, with which it is inseparably combined. Both tribunals concurred in holding, repeatedly, in so many terms, that the right of "visitation and search" does not exist in time of peace, cannot be exercised in time of peace, and that the belligerent claim is the only foundation of the right. Both concurred, also, in holding that the penalty for resisting this right is confiscation of the property so withheld from "visitation and search"; but Sir William Scott declared, that, in order to bring a case of resistance within the mischief of the rule, it must be shown, in the first instance, that the neutral vessel had reasonable grounds to be satisfied of the existence of a war; otherwise there is no such thing as neutral character, nor any foundation for the several duties which the law of nations imposes on that character. Clearly, therefore, if a neutral master, having no reasonable grounds to be satisfied of the existence of a war, may lawfully resist a search of his vessel, he may at the same time lawfully resist a visitation, or entry into his vessel. If he may do this in a time of actual war, because he is ignorant that war has been declared, he may surely do it when there is no war. He may resist the search, because no one has a right to search his vessel in time of peace; and he may resist the visit, because, if the visit is lawful, it can be so only because it has a lawful object, and the object can only be to ascertain his national character by inspection and examination, which in peace is not lawful.*

* So far as the use of language shows whether the public law acknowledges a distinction between "search" and "visit," we believe the facts to be these. In all languages on the continent of Europe, the term "visitation" has become technical, to describe the belligerent right of going on board a neutral vessel, to ascertain its national character. In the French language, there is no word corresponding to the term "search," as a technical legal term, to describe what is described by that word in English. In the German language, there are words which answer to the English word "search," but the writers on public law in that language have always used the word "visitation," which has become technical with them by adoption from the French. On the continent of Europe, therefore, the word "visitation," *visite*, describes the whole of that right which in English and Amer-

The right of visiting the ships of other nations for the purpose of ascertaining their real characters, in time of peace, had, before this controversy arose, been expressly negatived by the Supreme Court of the United States. Lord Aberdeen stated the claim to be "simply a right to satisfy the party who has a legitimate interest in knowing the truth, that the vessel actually is what her colors announce." The Supreme Court of the United States defined the exercise of this right, as long ago as the year 1826, and held that ships of war, sailing under the authority of their government, in time of peace, have a right to approach other vessels at sea for the purpose of ascertaining their real characters, *so far as the same can be done without the exercise of the right of visitation and search;* but that no vessel is bound to await the approach of armed ships under such circumstances, although it cannot lawfully prevent their approach by the use of force, upon the mere suspicion of danger. This decision was not binding upon the British government, so as to preclude them from maintaining another doctrine, if it was erroneous. But it was the decision of a court of the law of nations, just as far removed from the suspicion of prejudice or bias as the corresponding tribunal in England, and perfectly competent to declare what the law of nations is. When such a tribunal has decided a question of this kind, all governments that undertake to maintain a contrary doctrine are bound to show some decision of equal authority the other way, or that the law is otherwise held by other nations, or else to advance some reasoning that overthrows the reasoning of the decision. An adjudication on a point of international law, in a supreme tribunal of the law of nations, is not an *ipse dixit* of the government of the country in which the court is situated. It is an authentic declaration of the law, by functionaries who are bound to declare it impartially between their own government

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ican maritime law is called, by a pleonasm, the right of "visitation and search." Notwithstanding Sir Robert Peel declared that "there is nothing more distinct than the right of visit is from the right of search"; while Lord Brougham said that "the right of search and the right of visit are not two different rights," and "that 'visit' is the French word and 'search' is the English"; we must persist in looking to the proper judicial authorities, English and American, which describe the terms "visitation and search" as the right to go on board a neutral ship, and there demand an inspection of papers, and, if these are not satisfactory, to search the cargo. But who ever heard of the right, in time of peace, to ask for a vessel's papers?

and every other, and who are always presumed to have so decided. It is to be received in foreign countries, not as a conclusive authority, but with respect; and unless it appears to be an obvious misconstruction of public law, it forms the rule, until some decision or reasoning appears entitled to more respect, or the general practice of nations is found to be otherwise. So far as we know, this decision of the Supreme Court of the United States was not encountered with success, if at all, in any of the discussions on the British side of this controversy.

The subject of the right of search, or of visit, had been discussed between Lord Aberdeen and the American envoys in London, prior to the mission of Lord Ashburton; but no satisfactory conclusions had been reached. When Lord Ashburton came out to this country, the position of the matter was this. The British government had asserted the right to visit any ship bearing the American flag, to inquire and ascertain whether it was in reality an American vessel. If it turned out to be an American vessel, they admitted that it could not be detained, and that reparation must be made for any loss or injury sustained by the detention for the purposes of inquiry. On the other hand, our government denied the existence of any such right, and maintained that a vessel upon the high seas is subject, by the law of nations, to no detention or visitation except by a belligerent, for the purposes known and acknowledged by the law of nations as among belligerent rights. When the Treaty of Washington was under negotiation, it seemed to Mr. Webster desirable, not only that the country should engage in some practical efforts for the suppression of the slave-trade, but that all motive or necessity for the exercise of such an alleged right of examination or visit by British cruisers should be taken away. But it was by no means his purpose, in any arrangement which would supersede the claim of this right, to admit that the right itself had ever existed. He designed merely to make an arrangement which would enable us to execute our own laws against the slave-trade, and to perform our own obligations, by our own means and our own power, as being most consistent with the honor and dignity of the country. Accordingly, the treaty provided that each of the two governments should maintain on the coast of Africa a sufficient squadron to enforce, separately and respectively, the laws,

rights, and obligations of the two countries for the suppression of the slave-trade.

In his message to the Senate, communicating the treaty for ratification, the President of the United States stated these as the motives and inducements which had led to the introduction of this article into the treaty. In his subsequent annual message to Congress, at the opening of the session of 1842 – 43, he thus referred to the question of the right of visit : —

" Although Lord Aberdeen, in his correspondence with the American envoys at London, expressly disclaimed all right to detain an American ship on the high seas, even if found with a cargo of slaves on board, and restricted the British pretension to a mere claim to visit and inquire, yet it could not well be discerned by the Executive of the United States how such visit and inquiry could be made without detention on the voyage, and consequent interruption to the trade. It was regarded as the right of search presented only in a new form, and expressed in different words ; and I therefore felt it to be my duty distinctly to declare, in my annual message to Congress, that no such concession could be made, and that the United States had both the will and the ability to enforce their own laws, and to protect their flag from being used for purposes wholly forbidden by those laws and obnoxious to the moral censure of the world."

This statement was regarded in England as tending to convey the supposition, that the right of visit had been disavowed by Lord Ashburton, and that Great Britain had made concessions on that point, by assenting to the article in the treaty which practically superseded the exercise of the alleged right. On the 18th of January, 1843, Lord Aberdeen addressed a despatch to Mr. Fox, and instructed him to read it to Mr. Webster, in which he deprecated this conclusion, and reminded our government that the right of search did not form the subject of discussion during the late negotiation, and that no concession was made or required to be made ; that the engagement entered into by the parties to the treaty, for suppressing the African slave-trade, was unconditionally proposed and agreed to ; and announcing that England still maintained and would exercise, when necessary, its right to ascertain the genuineness of any flag which a suspected vessel might bear, subject to the duty of making reparation for injury to innocent parties.

This rendered it necessary for Mr. Webster to take up the question of the right of search ; and accordingly, on the 28th of March, 1843, he addressed a despatch to Mr. Everett in answer to Lord Aberdeen's despatch to Mr. Fox, in which he thus stated the true character of the treaty : —

" Lord Aberdeen is entirely correct in saying that the claim of a right of search was not discussed during the late negotiation, and that neither was any concession required by this government, nor made by that of her Britannic Majesty.

" The 8th and 9th articles of the Treaty of Washington constitute a mutual stipulation for concerted efforts to abolish the African slave-trade. This stipulation, it may be admitted, has no other effects on the pretensions of either party than this : Great Britain had claimed as a *right* that which this government could not admit to be a *right*, and, in the exercise of a just and proper spirit of amity, a mode was resorted to which might render unnecessary both the assertion and the denial of such claim.

" There probably are those who think that what Lord Aberdeen calls a right of visit, and which he attempts to distinguish from the right of search, ought to have been expressly acknowledged by the government of the United States ; at the same time, there are those on the other side who think that the formal surrender of such right of visit should have been demanded by the United States as a precedent condition to the negotiation for treaty stipulations on the subject of the African slave-trade. But the treaty neither asserts the claim in terms, nor denies the claim in terms ; it neither formally insists upon it, nor formally renounces it. Still, the whole proceeding shows that the object of the stipulation was to avoid such differences and disputes as had already arisen, and the serious practical evils and inconveniences which, it cannot be denied, are always liable to result from the practice which Great Britain had asserted to be lawful. These evils and inconveniences had been acknowledged by both governments. They had been such as to cause much irritation, and to threaten to disturb the amicable sentiments which prevailed between them. Both governments were sincerely desirous of abolishing the slave-trade ; both governments were equally desirous of avoiding occasion of complaint by their respective citizens and subjects ; and both governments regarded the 8th and 9th articles as effectual for their avowed purpose, and likely, at the same time, to preserve all friendly relations, and to take away causes of future individual complaints. The Treaty of Washington was intended to fulfil the obligations entered into by the Treaty of Ghent. It stands by itself ; is clear and intelligible.

It speaks its own language, and manifests its own purpose. It needs no interpretation, and requires no comment. As a fact, as an important occurrence in national intercourse, it may have important bearings on existing questions respecting the public law; and individuals, or perhaps governments, may not agree as to what these bearings really are. Great Britain has discussions, if not controversies, with other great European states upon the subject of visit or search. These states will naturally make their own commentary on the Treaty of Washington, and draw their own inferences from the fact that such a treaty has been entered into. Its stipulations, in the mean time, are plain, explicit, and satisfactory to both parties, and will be fulfilled on the part of the United States, and, it is not doubted, on the part of Great Britain also, with the utmost good faith." — pp. 161, 162.

Mr. Webster then entered into an examination of the question of the right of visit in all its bearings. After stating the British claim, as asserted by her Majesty's government, to be the right to visit a vessel upon the high seas in order to ascertain that the vessel actually is what her colors announce, he first contends that there is no such well-known and acknowledged, nor indeed any broad and generic, difference between what has been usually called "visit" and what has been usually called "search"; that the right of visit, to be effectual, must come, in the end, to include search; and thus to exercise, in peace, an authority which the law of nations allows only in times of war. He then proceeds as follows.

"An eminent member of the House of Commons thus states the British claim, and his statement is acquiesced in and adopted by the first minister of the crown: —

"'The claim of this country is for the right of our cruisers to ascertain whether a merchant-vessel is justly entitled to the protection of the flag which she may happen to have hoisted, such vessel being in circumstances which rendered her liable to the suspicion, first, that she was not entitled to the protection of the flag; and, secondly, if not entitled to it, she was, either under the law of nations or the provisions of treaties, subject to the supervision and control of our cruisers.'*

"Now the question is, *By what means* is this ascertainment to be effected?

"As we understand the general and settled rules of public law, in respect to ships of war sailing under the authority of

* "Mr. Wood, now Sir Charles Wood, Chancellor of the Exchequer."

their government, 'to arrest pirates and other public offenders,' there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real characters. Such a right of approach seems indispensable for the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce. On the other hand, it is as clear that no ship is, under such circumstances, bound to lie by, or wait the approach of any other ship. She is at full liberty to pursue her voyage in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. Her right to the free use of the ocean is as perfect as that of any other ship. An entire equality is presumed to exist. She has a right to consult her own safety, but at the same time she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers, either as to delay, or the progress or course of her voyage; but she is not at liberty to inflict injuries upon other innocent parties simply because of conjectural dangers.

"But if the vessel thus approached attempts to avoid the vessel approaching, or does not comply with her commander's order to send him her papers for his inspection, nor consent to be visited or detained, what is next to be done? Is force to be used? And if force be used, may that force be lawfully repelled? These questions lead at once to the elemental principle, — the essence of the British claim. Suppose the merchant-vessel be in truth an American vessel engaged in lawful commerce, and that she does not choose to be detained. Suppose she resists the visit. What is the consequence? In all cases in which the belligerent right of visit exists, resistance to the exercise of that right is regarded as just cause of condemnation, both of vessel and cargo. Is that penalty, or what other penalty, to be incurred by resistance to visit in time of peace? Or suppose that force be met by force, gun returned for gun, and the commander of the cruiser, or some of his seamen, be killed; what description of offence will have been committed? It would be said, in behalf of the commander of the cruiser, that he mistook the vessel for a vessel of England, Brazil, or Portugal; but does this mistake of his take away from the American vessel the right of self-defence? The writers of authority declare it to be a principle of natural law, that the privilege of self-defence exists against an assailant who mistakes the object of his attack for another whom he had the right to assail.

"Lord Aberdeen cannot fail to see, therefore, what serious

consequences might ensue, if it were to be admitted that this claim to visit, in time of peace, however limited or defined, should be permitted to exist as a strict matter of right; for if it exist as a right, it must be followed by corresponding duties and obligations, and the failure to fulfil those duties would naturally draw penal consequences after it, till ere long it would become, in truth, little less, or little other, than the belligerent right of search.

"If visit or visitation be not accompanied by search, it will be in most cases merely idle. A sight of papers may be demanded, and papers may be produced. But it is known that slave-traders carry false papers, and different sets of papers. A search for other papers, then, must be made, where suspicion justifies it, or else the whole proceeding would be nugatory. In suspicious cases, the language and general appearance of the crew are among the means of ascertaining the national character of the vessel. The cargo on board, also, often indicates the country from which she comes. Her log-book, showing the previous course and events of her voyage, her internal fitment and equipment, are all evidences for her, or against her, on her allegation of character. These matters, it is obvious, can only be ascertained by rigorous search.

"It may be asked, If a vessel may not be called on to show her papers, why does she carry papers? No doubt she may be called on to show her papers; but the question is, Where, when, and by whom? Not in time of peace, on the high seas, where her rights are equal to the rights of any other vessel, and where none has a right to molest her. The use of her papers is, in time of war, to prove her neutrality when visited by belligerent cruisers; and in both peace and war, to show her national character, and the lawfulness of her voyage, in those ports of other countries to which she may proceed for purposes of trade.

"It appears to the government of the United States that the view of this whole subject which is the most naturally taken is also the most legal, and most in analogy with other cases. British cruisers have a right to detain British merchantmen for certain purposes; and they have a right, acquired by treaty, to detain merchant-vessels of several other nations for the same purposes. But they have no right at all to detain an American merchant-vessel. This Lord Aberdeen admits in the fullest manner. Any detention of an American vessel by a British cruiser is therefore a wrong, a trespass; although it may be done under the belief that she was a British vessel, or that she belonged to a nation which had conceded the right of such detention to the British cruisers, and the trespass therefore an invol-

untary trespass. If a ship of war, in thick weather, or in the darkness of the night, fire upon and sink a neutral vessel, under the belief that she is an enemy's vessel, this is a trespass, a mere wrong; and cannot be said to be an act done under any right, accompanied by responsibility for damages. So if a civil officer on land have process against one individual, and through mistake arrest another, this arrest is wholly tortious: no one would think of saying that it was done under any lawful exercise of authority, subject only to responsibility, or that it was any thing but a mere trespass, though an unintentional trespass. The municipal law does not undertake to lay down beforehand any rule for the government of such cases; and as little, in the opinion of the government of the United States, does the public law of the world lay down beforehand any rule for the government of cases of involuntary trespasses, detentions, and injuries at sea; except that in both classes of cases law and reason make a distinction between injuries committed through mistake and injuries committed by design: the former being entitled to fair and just compensation, — the latter demanding exemplary damages, and sometimes personal punishment. The government of the United States has frequently made known its opinion, which it now repeats, that the practice of detaining American vessels, though subject to just compensation, if such detention afterward turn out to have been without good cause, however guarded by instructions, or however cautiously exercised, necessarily leads to serious inconvenience and injury. The amount of loss cannot be always well ascertained. Compensation, if it be adequate in the amount, may still necessarily be long delayed; and the pendency of such claims always proves troublesome to the governments of both countries. These detentions, too, frequently irritate individuals, cause warm blood, and produce nothing but ill effects on the amicable relations existing between the countries. We wish, therefore, to put an end to them, and to avoid all occasions for their recurrence." — pp. 166 – 169.

This argument has never been answered, and the question of the right of search now slumbers with many other alleged rights, which have been advanced without the necessary support of sound principle. Probably it will never be revived; and therefore we take occasion to say, that it appears to us not at all necessary to consider whether the provision in the Treaty of Washington for the maintenance of squadrons on the coast of Africa is more or less effectual in helping to suppress the slave-trade than the right of search would have been, or would now be. The complaint in England, on the

part of those who complained at all against the treaty and its accompanying discussions, was, that in the great object of suppressing the trade, a step had been taken backwards, by an apparent surrender of the right of search. As to any surrender of the right, we maintain that it never existed, and therefore nothing was surrendered — if the absence of an answer to Mr. Webster's positions is to be taken as a surrender — but an unfounded pretension. As to the complaint, that a mutual right of search has not been conceded by us, and that the treaty and the correspondence had the effect of preventing other powers, as they certainly had, from conceding it, and therefore that the world is not in so good a position for putting down the slave-trade as it was before the treaty, there are two answers to be made. The chief answer is, that the right of search, without treaty, is contrary to law, and therefore it cannot be submitted to by us, or by any other nation, and ought not to be, if it could; and the right of search conceded by treaty will not be submitted to by our people, and therefore it cannot be forced upon them by their government. The suppression of the African slave-trade is a great object, to be desired by all Christian nations, and to be accomplished by all practicable means; but this is not a practicable means, because a commercial people will not endure it. Its inconveniences, its annoyances, and its certain abuses, however regulated it may be, are so great, that commerce cannot be made to bear it. We submit to the belligerent right of search, because it is the law, and because we cannot help it. But a search in time of peace we do not submit to, because we can help it; and we choose to help it, because we do not regard it as so manifestly the best and only means of accomplishing the suppression of the traffic, as to make it a high moral duty to endure its inconveniences.

This brings us to the second answer to this complaint. It is a fact, which the experience of the last ten years has amply demonstrated, that a general suppression of the traffic, by means and appliances to be used on the coast of Africa, whatever they may be, is almost, if not quite, hopeless. Nothing short of a blockade by all the navies of the world, backed by all the resources of the world, and withdrawn from every other duty, will entirely destroy the trade, so long as a market exists, beyond the blockading force, to which the slave-

dealer can run his cargoes. The gains to be made in this trade are so enormous, as to compensate for all the risks which have ever yet been accumulated upon the coast of Africa, and for all that probably can be accumulated there, by the humane policy of Christendom ; and these gains will operate as a temptation to an indefinite extent, as long as they can be made. Destroy the market, therefore, if you would do something effectual. As long as Spain and Portugal keep open their ports to the reception of the slaves, so long men will be found to buy or steal them, and to transport them across the sea.

Do we, then, regard the provision in the treaty as of no value ? We are far from thinking so. It is of great value, as it evinces our readiness to do what is really practicable *towards* a suppression of the trade. It is of great value, as it places on the coast a squadron that can prevent the fraudulent use of our flag by the slave-dealers of other nations, and can send home for trial any Americans who may be caught in the traffic ; and it is of great value, as it makes it unnecessary for us, in doing what we can for these objects, to subject our ships to detention and search by foreign cruisers. These are its legitimate advantages ; and they are not to be weighed in the balance against the advantages flowing from an alleged right which never existed, or from a concession which never could have been made.

Another of the important and interesting questions with which Mr. Webster had to deal was that involved in the case of Alexander M'Leod ; and the manner in which he met it was in the highest degree honorable to him and to the government in which he bore a distinguished part. The details of this case are so familiar to the public, that we need not here repeat them. We refer to it now, for the single purpose of stating the grave question which it raised, and of expressing our humble astonishment that any body should ever have doubted the soundness of the principle on which Mr. Webster acted. Whoever denies the correctness of that principle flies in the face of a rule of the public law as unquestionable as reason and authority can make any proposition whatsoever. That the soldier is not amenable to the criminal justice of a foreign country, for acts done under the orders and on the responsibility of his government, is one of those rules which lie at the foundation of the whole system

of modern civilization. It follows irresistibly from the moral impersonation of nations, by which they become known to each other as accountable existences, and through which alone they can act in international relations. Strike this rule out of the code of nations, and you strike at the root of the code itself; you reduce the world to lawless and promiscuous collections of individuals without nationality, without the corporate capacity, and without the power of redressing wrong and repressing violence which the corporate capacity confers on the great divisions of mankind. If the soldier is to be held responsible criminally in a foreign country for executing the orders of his own government, if the agent may not shelter himself under the authority of the great principal behind him, whose adoption of his act brings a responsible and an equal antagonist at once into the quarrel, there would be no rule upon which the real aggressor could be reached. Nation would no longer be responsible to nation. Individuals would be the only recognized actors in the strifes of the world; and the soldier, who now limits his energies to the fulfilment of his sovereign's commands, and therefore has no motive for greater violence than his duty demands, would become a pirate and a scourge, waging unnecessary war upon his own responsibility, for his own revenge and his own safety.

We think that Mr. Webster was not only entirely right, when he threw over the vaporing and foolish Canadian who had ventured into the lion's den the protection of this principle, but that he deserves great praise for the firmness and dignity with which he stood between the roused anger and impatient demand of England on the one side, and on the other the equally roused jealousy of a great State, which was just "swooping to its revenge" for what it felt to be a great outrage upon life and property, and could ill brook delay or obstacle to its indignant justice. England demanded of the Federal Government the immediate release of M'Leod, although he was under indictment in a State court, and awaiting trial; announcing that the acts for which he was thus held were done by her order, and done by him, if at all, as a public servant. Mr. Webster admitted at once, that, after the transaction had been avowed as a public transaction, the individual concerned in it ought not, by the principles of public law and the general usage of civilized states, to be

held personally responsible in the ordinary tribunals of law for his participation in it. But he was obliged, notwithstanding the British envoy had entreated the President "to take into his most deliberate consideration the serious nature of the consequences which must ensue from a rejection of the demand," to point out, that, as M'Leod was detained under judicial process, he could be discharged only by application to the courts of law, and not by the power of the executive government; that the immunity claimed for him must be proved as a fact upon his trial, and that upon such proof he would be entitled to be discharged. The course of the Secretary in answer to the demand of the English government was, however, plain and easy, in comparison with the task of dealing with the authorities of the State of New York. The relations of the Federal and the State governments, in our complicated system, are always delicate, and when there is no positive provision of the Constitution or of statute to meet the case, they become highly embarrassing. It was clear that England had a right to demand the release of M'Leod from somebody; it was equally clear that a foreign government knows not, and cannot know, any diplomatic relations with any public organs in this country other than those of the Federal Union. But it was also just as clear, at that time, that the government of the United States could not, by direct interference, take the prisoner out of the hands of the judicial authority of a State, although it was made certain that the trial and punishment of that prisoner would be followed by a declaration of war against the United States. The danger was therefore imminent, and the circumstances were in the highest degree critical. If M'Leod had been tried and *punished* by the courts of New York, we should have been involved in a war with England, upon a point on which the whole world would have exclaimed against us, and which would have shut out for ever from the sight of all mankind the whole merits of our complaint against England for the affair of the Caroline. Upon the successful disentanglement of M'Leod's case from the original controversy depended our whole chance of obtaining a clear discussion and final reparation of the wrong done by the violation of our territory; and upon the admission of the principle which England advanced for his protection depended our whole chance for keeping upon our side the respect and sympathy of the civil-

ized world. It was a case, therefore, for circumspect and cautious, but prompt and decided action, — action, that would not derange the complicated internal relations of our system, or throw down the barriers of any constitutional or legal principle, but at the same time would show to England, to the State of New York, and to the world, that the Federal Government was ready to do every thing, within the sphere of its competency, that could of right be demanded of it.

Mr. Webster took precisely the course suited to this embarrassing exigency. He despatched the Attorney-General of the United States into the State of New York, with instructions to see that the counsel of M'Leod were furnished, on his trial, with the proper evidence that the acts for which he was indicted were avowed and adopted by England as acts of public force, done by national authority; and with the further instruction, in case this defence should be overruled by the court in which he was to be tried, to have the proper steps taken immediately for removing the cause by writ of error to the Supreme Court of the United States. He thus avoided all interference with the regular administration of local law, and at the same time secured to the prisoner a complete defence, which would certainly have been successful in the Federal court, if it had been necessary to remove the cause thither. Fortunately, however, an *alibi* was proved, and M'Leod was acquitted.

But the fact can never redound to the credit of the State of New York, that M'Leod was ever tried at all. An opportunity was afforded for his discharge, and for the delivery of a judgment upon the great and interesting point involved in his case, that would have illustrated the judicial annals of the State through all future ages. The very opportunity was afforded which the judiciary of an enlightened State might have coveted, could they have directed the whole course of events; an opportunity for some great jurist, rising superior to every local passion, and drawing from their high fountains the great truths of a jurisprudence that is not fed by local ideas, to have shown the world, that, however fiercely the waves of popular excitement may urge, there is in every government of law an organ which can save the popular will from the violation of principle, by declaring justly, learnedly, and fearlessly what the principles of law demand. This opportunity, by which a Kent, a Spencer,

or a Tallmadge would have set a jewel on the radiant brow of the Empire State, was miserably lost. M'Leod, before his trial, was brought by *habeas corpus* before the Supreme Court of the State, and his release was demanded on the ground set forth in Mr. Fox's letter to Mr. Webster, and in the instructions of the latter to Mr. Crittenden. After an elaborate argument, the court decided, in substance, that a foreign soldier, although he acts under the orders of his government, who avow his act as a public transaction, is nevertheless amenable to the laws of the country in which the act is done, by indictment in the courts. We have read the opinion in which this extraordinary conclusion was reached, by a process which we cannot call reasoning. It deserves all that has been said of it by citizens of New York, or by others; and the best wish we have ever been able to form for it is, that it may pass into that oblivion which would be only a too happy, though it is not a usual fate, where great questions have been at stake, for all legal judgments clearly erroneous and absurd.

But, fortunately, and thanks to the wisdom of Congress, this thing can never occur again. By an act of Congress, passed on the 29th of August, 1842, authority has been given to the judges of the United States courts to take any prisoner, by *habeas corpus*, out of the hands of any State authorities, who is under confinement or custody "for any act done or omitted under any alleged right, title, authority, privilege, or protection set up or claimed under the commission, or order, or sanction of any foreign state or sovereignty, the validity or effect of which depend upon the law of nations, or under color thereof"; and to discharge the prisoner, if, upon hearing, he appears to be entitled to be discharged by reason of such an exemption. This act also provides a direct appeal to the Supreme Court of the United States, if the decision of the judge in the first instance is supposed to be erroneous. It was passed with the full concurrence of many of the most eminent jurists in the country, some of whom assisted in its preparation; it has met with the nearly unanimous approbation of the legal profession; and it has armed the Federal Government with very effectual further means of fulfilling its obligations to foreign nations, and their citizens and subjects, and consequently with further powers to protect the peace of the country. It adopts and

embodies the precise principle on which Mr. Webster acted in the case of M'Leod, and is a solemn legislative sanction of the correctness of his course.

The government of the United States having done its whole duty in relation to the case of M'Leod, and that individual having been acquitted in the courts of New York, a way was open for demanding and obtaining all the needful redress for the violation of territory occasioned by the burning of the Caroline. Mr. Webster brought this subject to the consideration of Lord Ashburton by a letter, in which he inclosed a communication made by him a year before to Mr. Fox; and announced that the government of the United States still regarded the act as "of itself a wrong, and an offence to the sovereignty and dignity of the United States, being a violation of their soil and territory, — a wrong for which to this day no atonement, or even apology, has been made by her Majesty's government." The letter to Mr. Fox of the previous year had stated the whole argument applicable to the facts of the case, showing the character of the act, and maintaining that, if it was justified on grounds of self-defence, a necessity must be shown, "instant, overwhelming, leaving no choice of means and no moment for deliberation." There is a dignity, a power, a clearness, and a precision, in this document, and a display of the principles which hedge and protect national sovereignty, that render it one of the most important as well as interesting productions that have come from the pen of its distinguished author. It contains also an elaborate summary of what has been done by our government, from the first, in discharge of the duties of neutrality, which shows that we have done much to promote peace and good neighbourhood, and to advance the civilization of mankind.

The answer of Lord Ashburton was the ablest among all his official papers connected with his mission. We concur entirely in the praise bestowed upon it by Lord Brougham, when he said, — "I really do not know which the most to admire in this passage, the remarkable force, point, and precision of the language, or the dignity of the assertion of the right." As a composition, it deserves to stand in the highest rank. As an argument, it makes all that could be made out of the facts tending to show a justification; but perceiving that, when that argument was exhausted, there still re-

mained a violation of territory, its author proceeded, with great frankness and great dignity and delicacy, to express the regrets of his government for the fact of such a violation. Mr. Webster immediately replied, that the President received the acknowledgment in the conciliatory spirit in which it had been made, and that the subject would not be made the topic of any further discussion between the two governments.

It can scarcely be necessary for us to point out the importance of this precedent, or of the principle which it establishes. It is, as far as we now remember, the only occurrence of its kind in history, where a government, pursuing an object perfectly lawful in itself, had, in reaching the object which it had to strike, violated the territorial sovereignty of a neighbouring nation, and where the occurrence had been followed by a complaint for that violation. Such things have doubtless happened before; but never, we imagine, under circumstances which made it absolutely necessary not to allow it to pass. It was manifest that, if similar proceedings, attended by the circumstances surrounding this case, were allowed to occur, they must lead to bloody and exasperated war; and it is now established that, when they do occur, there is a rule which will measure the extent of the justification, and, by requiring an atonement for that which remains a trespass, after all that can be urged, will preserve national territory inviolate and inviolable, for the weak and the strong alike.

Never were two men more fitted to conduct such negotiations as these to a happy issue, than Lord Ashburton and Mr. Webster. The one was a thorough Englishman, not bred in the practice of sacrificing truth and justice to diplomatic arts, but astute, sagacious, and candid; master of a style which reflected admirably the sincerity and manliness of his character; sufficiently informed upon all the general principles applicable to the subjects in controversy; warmly desirous of peace, because capable of appreciating all the relations of England and America; and entertaining always a friendly regard to this country, but never forgetting the interests and honor of his own; with no party purposes to accomplish, and with no object but to serve his sovereign and to benefit the world. He came here, and set an example of moderation, frankness, and elevation of mind, which the statesmen and diplomatists of every country may profit-

ably follow. The other, — who shall adequately describe him? — with his great powers, experience, and patriotic feeling; with his vast resources, in which the training of the forum and the senate have equalled the great gifts of nature; with his power of concentration, that exhausts, without encumbering, the subject which it grasps; with his lucid reasoning, his unrivalled English, and his majestic thought; with his wise and reflecting spirit, careful for the welfare of his country, and studious from afar of the things that make for its happiness and renown; fully impressed with the hazards which he ran for his own reputation by remaining in office and awaiting the coming messenger of England, but seeing in advance the inevitable connection between his own fame and the termination of controversies which circumstances had enabled him, and him alone, to terminate. He met his antagonist, for the high debate which he had come to hold, without a single unworthy use of the advantages of his position, and in a spirit of equal frankness, sincerity, and truth. It is well known, that, just previously to the announcement of Lord Ashburton's intended mission, it seemed scarcely possible, to the wisest on either side of the Atlantic, for England and America to close their long pending difficulties but by the dread arbitrament of war. It is equally well known, that at this time, the pressure of party opinions on the American Secretary was most severe, to induce him to quit his post. The hour was dark, for it seemed as if he must quit that post, and war must come; but it was the hour that precedes the dawn. As soon as the intention of the British ministry to send out a special minister was formed, it was communicated privately to Mr. Webster from England. He saw a light breaking in upon the thick gloom before him, a light which others did not see; and we can fancy him cheered by the words which the poet has put into the mouth of Richelieu: —

> "Take away the sword;
> States can be saved without it."

When the two negotiators met and proceeded to their work, it was in a style and manner very different from that usually practised in diplomacy, but eminently suited to the topics which they had to discuss. If we have made any thing clear in the foregoing pages, it is, that these subjects demanded reasoning and argument. They were great ques-

tions of law. To make adroit and rapid movements in the game, to checkmate each other on the board, or to exercise mere ingenuity and skill in the discussion, would have resulted in nothing at all. Questions depending on moral reasoning were to be settled. The debaters were to ascertain and demonstrate to each other, and to the world, what public jurisprudence declares to be the truth upon those questions. It happened that, in regard to most of them, we were to establish the affirmative of certain positions; and hence the letters of Mr. Webster were arguments addressed to the convictions of his antagonist, to obtain an express or an implied assent to his positions, or to develope the grounds on which his own government intended hereafter to rest with regard to these subjects.

The careful reader of these documents will hereafter observe the manner in which Mr. Webster extracts the question to be discussed from the circumstances out of which it arises. In his statement of the case, statement becomes argument. The principle which he intends to maintain becomes so clear, as he advances through the facts with which he has to deal, that the assent of the reader is almost gained, before he has surrounded it with the illustrations which illuminate the course of his reasoning, and carry us willingly captive along to the conclusion. In these illustrations, there is, too, an extraordinary amount of legal knowledge, expressed in the clearest terms. The whole body of these papers may be profitably resorted to as a text-book upon a great variety of questions in international law. Here the student will find the principles which govern the rights of persons and vessels entering a foreign friendly port; the extent to which the comity and practice of nations oblige governments to permit the law of a foreign country to be brought into its waters for the government of the relations of foreigners who may come into them; the distinctions between an exclusive and a mixed jurisdiction; the rules which determine when one system of law applies and another does not apply; the distinction between what a state may do by positive provision, and what it is presumed not to intend, when it has made no such provision; the force and extent of the law which creates the condition of slavery, when the person affected by that condition leaves the soil where that law prevails; the rules which declare that a ship is an extension of territorial sover-

eignty ; the limitation which this principle opposes to the exercise of any act of foreign sovereignty within such limits ; the rights of mariners under the law of nations, and their consequent exemption from the law of perpetual allegiance when that law undertakes to follow them into a foreign vessel ; the mode in which the sovereignty of a nation is offended by the practice of impressment ; the inviolability of national territory, and the circumstances which will make a case of self-defence that can excuse a trespass upon it ; the extent to which the citizens of one country may take part in the civil commotions of another, and the nature of their offence, if it be one ; the duties of neutrality, and the obligations of governments to enforce them ; the personal immunity afforded to military men by the fact that they act under the orders of their sovereign ; the distinction in all constitutional governments between the executive power and a function of the judiciary ; and the great topic of the immunity of flags, and the respective rights of public vessels and merchantmen upon the high seas, in time of peace, as distinguished from a state of war. Information upon these and many other topics, of the highest value and authority, may be found in these pages. When the questions involving these subjects came under Mr. Webster's cognizance, they were brought to the ordeal of legal scrutiny, to an extent not common in diplomatic discussions; and therefore, as we think, the world has gained something in the results.

The United States, at least, have gained all that was undertaken. Impressment has been rendered a nullity ; the question arising out of the case of the Creole stands upon an unanswered argument made six years ago, and therefore it is to be held unanswerable ; the right of search, in the judgment of Europe and America, is gone ; and for the invasion of our territory by the burning of the Caroline, an apology, ample, but without injury to the pride of England, was obtained. If to these we add the settlement of the boundaries, the provisions for the suppression of the slave-trade, and the incorporation into the public code of the mutual surrender of fugitives charged with crime, — that high moral obligation which the whole body of jurists, from Grotius down, have desired to see enforced, but could not declare to be part of the public law, — we shall be content with the decision of Mr. Webster, when he concluded to hold the seals of office until these things could be accomplished.

As we are writing these observations, the news is received of the assembling of a small body of well-meaning enthusiasts, in Europe, to promote the adoption of arbitration, as a means of settling international disputes, and the entire or partial disarming of the nations. We have no space and but little inclination to discuss this project. The great practical difficulty with regard to arbitration, as a general practice, upon such questions as those which arise between nations, is, that no system can be devised to enforce the award, by an independent power, and compliance with its terms must therefore be at last enforced by an appeal to arms by the parties themselves. All that upholds the practice of arbitration between individuals, in any society where it is extensively used, is the fact that the regular tribunals of justice will enforce the award. But in the case of nations, no power can be lodged with any third party, by positive institution, which would be great enough for the purpose of enforcing the decrees of the proposed tribunal, and would, at the same time, be tolerated by the nations. The executive force of such an institution must consist of standing armies and navies perpetually afloat, greater than are now required to preserve the peace of the world; and without such a force, its decrees would be mere waste-paper. We have therefore little to hope from such a project, even if it were agitated by persons of more influence than those engaged in it at present. To our thinking, the example given by two such nations as England and the United States, of appointing two such persons as Lord Ashburton and Mr. Webster, at a time when causes of difference had almost exhausted mutual forbearance, to meet, discuss, and settle every question in dispute capable of settlement, is of more value than all the arbitrations in history. When, we may ask, has there been a question, between any two countries in modern times, which would have admitted of statement and submission to an arbitrator, which two such men could not have settled? When has there been a question between France and England, for the last five-and-twenty years, which could have been thus settled by the Duke of Wellington and the Duc de Broglie? The truth is, that but few wars grow out of questions which could be formally stated for the decision of an arbitrator, by being disentangled from all the circumstances and disturbing causes of which an arbitrator could take no cognizance. These disturbing causes,

which intrude between the pure deductions of reason and the results to which they lead, exist in the minds of men, in the temperaments of races, in the development of new ideas leading to social convulsions, in the necessities, real or imaginary, of differing nations, and in the shifting aspects of institutions, which cannot always be pulled down or built up without violence. When such causes are in operation, when the waters are out, and the great deeps are broken up, wars must come; and no arbitrator and no umpire can grasp or resolve the complicated elements of the dispute. But when, in a period of general peace, questions have sprung up, which touch national honor rather than immediate national interests, which may be rescued from the dominion of the passions, and be subjected to the ordeal of reason by discussion and statement, — then is the period for the higher statesmen of the world to interpose. Then it is possible, with a certain class of minds, clothed with sufficient authority on either side, and without any umpire to vex by a wrong decision, to reach a final termination of the worst of such controversies, and to show that

> "Beneath the rule of men entirely great,
> The pen is mightier than the sword."

ART. II.— *The Works of Henry Fielding, with a Life of the Author.* By THOMAS ROSCOE. London: Henry G. Bohn. 1843. 8vo. pp. 1116.

THERE is no word more provokingly equivocal than history. In one sense, it simply indicates a department of literature; in another, the sum and substance of all departments. He who should read all the so-called historians of the world, from Herodotus to Hallam, would, in common phrase, be considered as possessing a knowledge of history; but in respect to the thing itself, he might be more ignorant of many ages and nations than one who had devoted his time to plays and novels. In regard to the history of England, especially, it is curious how small a portion of our realized and available knowledge of the English mind and people is derived from the standard narratives of public events. When, after ex-